IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 458 of 1984
With
FIRST APPEAL No. 459 of 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SUBAMIYA HASUMIYA & 1 - Appellant(s)
Versus
AMIRUNISA YAKUBKHAN PATHAN & 2 - Defendant(s)

==========

Appearance :
MR AJ PATEL for Appellant(s) : 1 - 2.
MR HB SHAH for Defendant(s) : 1 - 3.
RULE UNSERVED for Defendant(s) : 1.2.1,1.2.2

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 25/08/2006

ORAL JUDGMENT

As both these appeals which are cross-appeals filed challenging the judgment and decree

dated 31st January 1984 passed in Civil Suit No. 3734 of 1979, they are being disposed of by this common judgment and order.

2. So far as First Appeal No. 458 of 1984 is concerned, the same is filed by the appellants, original-defendants [hereinafter referred to as 'the defendants'] challenging the judgment and decree 31.1.1984 passed by the learned Judge, City Civil Court at Ahmedabad in Civil Suit No. 3734 of 1979 in partly decreeing the said suit and directing the appellants, original-defendants to hand over front room of the suit property, i.e., room bearing No. 4172/A by treating them as trespassers. So far as First Appeal No. 459 of 1984 is concerned, the same is filed by the original-plaintiffs challenging the very judgment and decree passed dated 31st January 1984 by the learned Judge, City Civil Court at Ahmedabad in Civil Suit No. 3734 of 1979 in decreeing the aforesaid suit partly only qua the front room of

the suit property only and in not decreeing the suit qua the rear portion of the room of the suit property.

3. When both these Appeals came to be heard finally, Shri Shital Patel, learned advocate appearing on behalf of the appellants of First Appeal No. 458 of 1984, i.e., original-defendants of Civil Suit No. 3734 of 1979 has submitted under instructions of his clients that he does not press for the present First Appeal, however requested to grant some time to the original-defendants to vacate from the front portion of the suit property so that some alternative arrangement can be made. He has requested for 8 months' time to vacate from the suit property as per the decree passed by the learned Trial Judge. He has submitted that all the major members who are residing in the suit property are ready and willing to give usual undertaking that they will hand over peaceful and vacant possession as per

the decree passed by the learned Trial Judge on or before 1st July 2007 and that they will not transfer, alienate, in any manner whatsoever the suit property and/or induct any person into the suit property, and that the said undertaking will be filed within the period of two weeks from today. In view of the above, the First Appeal No. 458 of 1984 is dismissed as having not pressed. However, considering the request made on behalf of the original-defendants and other persons who are in possession of the suit property, time is granted to vacate from the suit property, as per the judgment and decree passed by the learned Trial Judge, upto 30th June 2007 on condition that all the major persons, who are in occupation and possession of the suit property, shall give usual undertaking before this Court within the period of two weeks from today to the effect that they will hand over peaceful and vacant possession of the suit property as per the judgment and decree dated 31st January 1984 passed

by the learned Trial Judge of City Civil Court, Ahmedabad, on or before 1st July 2007, and, in the meantime, they will not induct any other person in the suit property and that they will not transfer, alienate, and/or create any interest and/or charge on the suit property in any manner whatsoever.

4. So far as First Appeal No. 459 of 1984 filed by the original-plaintiffs challenging the judgment and decree passed by the learned Judge, City Civil Court, Ahmedabad in Civil Suit No. 3734 of 1979 in allowing the suit partly only and in not decreeing the suit with regard to rear portion of the room of the suit property is concerned, Shri PC Master, learned advocate appearing on behalf of the original-plaintiffs has vehemently submitted that the learned trial Court has materially erred in holding that the defendants were the tenants of the rear portion of the room of the suit property and therefore it

is requested to allow the First Appeal No. 459 of 1984.

5. On going through the Record and Proceedings and the judgment and decree passed by the learned Judge, City Civil Court, it is not in dispute that the affidavit of the original-plaintiff No.1 was produced at Exh. 60 and the same was proved by examining the Advocate, Ms. Manoramaben Thakore who had categorically admitted that the said affidavit was sworn by the plaintiff No.1 and the same was prepared by her under the instructions of plaintiff No.1. Now, so far as the affidavit at Exh. 60 is concerned, the said affidavit was sworn for the purpose of being produced in the proceedings under Section 145 of the Code of Civil Procedure between Salembhai on the one hand and the defendants on the other, and in the said affidavit original-plaintiff No.1 has very much in terms stated that the defendants have been residing in the suit

property since the time of the mother who the plaintiff meant was the mother of the defendant No.1. It is also stated in the said affidavit that the defendants have been residing in a portion of the property since long and they have their own household kit therein; the said Salembhai had given portion of the suit property to the defendants for their occupation; since the time of the mother of the defendant No.1, Salembhai was charging Rs. 7 per month by way of rent; and since about 2 years prior to filing of the affidavit Salembhai was charging Rs. 14 per month as rent from the defendants. In the said affidavit, the original plaintiff No.1 has stated that he resides just by the site of the suit property and that on September 30, 1968, at that time of Court compromise Salembhai was put in possession of one room which is by the side of Advance Cinema, where the rear room which was in possession of the present defendants since more than 20 years, was allowed to be retained in

their possession by the agreement and understanding between Salembhai and the defendants. In the said affidavit, the plaintiff has further stated that for about 20 years the possession of the rear room is with the defendants and the defendants have been continuously occupying the rear room since that much time. He has further stated that it was not so happened that on September 30, 1968, the defendants handed over possession of one room to Salembhai and thereafter the defendants effected their reentry therein. Now, considering the Affidavit Exh.60 sworn by the original-plaintiff No.1 wherein it was clearly admitted by the plaintiffs that the defendants were in occupation and possession of the rear room of the suit property since many years, it is required to be noted that the plaintiff No.1 has not stepped into the witness box for the purpose of disputing the Affidavit at Exh. 60 and deliberately he has not stepped into the witness box, otherwise he

would have been confronted with the affidavit at Exh. 60. Now, relying upon the admission of the Affidavit of plaintiff at Exh. 60, when the learned Trial Judge has held that it cannot be said that the defendants are trespassers also in rear portion of the room and/or the rear room of the suit property, the learned Trial Judge has rightly not passed the decree against the defendants so far as the rear room of the suit property is concerned.

6. On going through the entire judgment and decree impugned herein, this Court is in complete agreement with the finding and reasoning given by the learned Judge of the City Civil Court.

7. For the reasons stated above, the First Appeal No. 459 of 1984 is dismissed, however, there will be no order as to costs. Ad-interim relief stands vacated forthwith.

Rmr. [M.R. Shah,J.]